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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 417

WESTWOOD PHARMACAL CORPORATION, a corporation, and FOSTER-MILBURN COMPANY,

Petitioners,

vs.

JOHN FIELDING, JR. and DOLPH OBERGFEL,

Respondents.

Reply Brief in Support of Petition for Certiorari

Much of respondent's brief is devoted to the contention that this Court lacks jurisdiction to grant certiorari because, so it is argued, the constitutional question was not raised below.

1. The opinion of the court below explicitly states that it was deciding the question of due process (Pet. for Cer., p. 3). This Court has often said that if the state court raises and decides the constitutional question, that fact conclusively establishes that the point was properly raised. E.g., *McCollum v. Board of Education*, 333 U. S. 203, 207; *Home Insurance Co. v. Dick*, 281 U. S. 397, 407; *Chicago R. & P. Railway Co. v. Perry*, 259 U. S. 548, 551.

In *Cissna v. Tennessee*, 246 U. S. 289, 293, noting that appellant had not urged below that the case turned on questions of federal

law except as that might be inferred from the nature of the grounds presented, the Court said:

> "But if the Supreme Court of the State treated federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised."

Here the court below could not have reached its decision without deciding the issue of due process against petitioners. Respondents argue that each State may have its own views of what constitutes "doing business" so as to subject a foreign corporation to the jurisdiction of its courts. So it may, but only within the limits of due process. A State may, on state grounds, choose to hold a foreign corporation not subject to service in circumstances where the federal constitution would impose no objection.* But the reverse is not true. A state decision holding service improper does not necessarily decide the federal question. A decision upholding service *necessarily* does.

2. Respondents assert (Br. p. 4) that the constitutional issue is not open, because an issue not raised in the trial court cannot be raised on appeal in California. We doubt the assertion as to California practice, but it is irrelevant, since the issue was in fact decided by the court below. *Home Insurance Co. v. Dick*, 281 U. S. 397. Moreover, this case did not come to the court below by way of appeal from a trial court. It was an original proceeding (Pet. for Cer. pp. 2, 6), and the opinion is conclusive that the issue was raised and decided in the very court where the case originated.†

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*On this ground respondents would distinguish *Polizzi v. Cowles Magazines, Inc.*, 197 F.2d 74, certiorari granted October 20, 1952. But that case arose in a federal court.

†It would be absurd to say that petitioners, having succeeded in quashing service in the trial court, could be deprived of the right to assert their constitutional protection when application was made to another court for a writ of mandamus. Moreover, the actors in the court below (respondents) did not see fit to lay before that court the record in the trial court (Pet. for Cer. p. 6). Thus they go outside the record in asserting what did or did not happen in the trial court.

3. Respondents next argue that when the court referred to "due process", that was not a sufficient identification of the Fourteenth Amendment.

This Court, applying a common sense test, has often said that no form of words is necessary, it being enough if by ordinary canons of construction what was said presented the federal question. E.g., *Tilt v. Kelsey*, 207 U. S. 43, 51; *Saltonstall v. Saltonstall*, 276 U. S. 260; *Missouri-Kansas etc. Railway v. Elliott*, 184 U. S. 530; *Bryant v. Zimmerman*, 278 U. S. 63, 67. In some of the cases, the constitutional provision was not identified by any designation. In *Tilt v. Kelsey*, the right asserted was not in terms stated to be claimed under the Constitution.

Here, in common sense and by ordinary usage the words "due process" specify the precise provision as much as do the words "Fourteenth Amendment".

This is not a case where the reference to due process was a mere shotgun epithet. The exact respect in which the claimed deprivation occurred was specified, to wit, "whether the corporations were doing business within this state * * * to the extent that assumption of jurisdiction over them is consistent with due process." (Pet. for Cer., p. 3).

This declares the issue with precision, all the more precise because the very issue has arisen in a multitude of cases.* For that reason *Thomas v. Iowa*, 209 U. S. 258, cited by respondent, is not in point.

4. Respondent next argues that the reference to "due process" in the opinion below should be treated as relating to a provision of the state constitution.

But again, a standard of common sense is required. In the context of the issue of "doing business" for the purpose of ac-

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*In many situations where certainty of expression is essential, the background of experience and common understanding has been held to be enough to make words certain. E. g., *Nash v. United States*, 229 U.S. 373; *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 115; *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Seven Cases v. United States*, 239 U.S. 510, 517; Reed, J. in *United States v. Petrillo*, 332 U.S. 1, 16.

quiring jurisdiction, everyone knows that "due process" relates to the federal constitution. This is what courts and counsel mean when they use the words. This is shown, for example, by *West Publishing Co. v. Superior Court,* 20 Cal. 2d 720, 128 Pac. 2d 777 and *International Shoe Co. v. Washington,* 326 U. S. 310, both cited in the opinion below. Citations in the opinion of the court whose judgment is sought to be reviewed may be examined to see whether the constitutional issue was raised and decided. Cf. *Bryant v. Zimmerman,* 278 U. S. 63. The opinion must be read as a whole, *State Tax Commission v. Van Cott,* 306 U. S. 511, 514, and in the light of the facts and issues of the case, *Perkins v. Benguet Consol. Mining Co.,* 342 U. S. 437 (which involved due process as respects doing business). The opinion below not only states that the question is one of due process but concludes (R. 60) that the facts did not present "a question of the power of the state," citing *International Shoe Co. v. Washington,* 326 U. S. 310, which involved the question of due process under the Fourteenth Amendment.

The words "due process" are not ambiguous. But even if they were, this Court has said in *Minnesota v. National Tea Co.,* 309 U. S. 551:

> "It is * * * important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action " (p. 557).

If "due process" under the state constitution had a different meaning from that under the federal, particularly if it imposed a greater restraint on the state, a different problem might be presented. But the case cited by respondent, *Manford v. Singh,* 40 Cal. App. 700, 181 Pac. 844, decided 33 years ago, settled that the state due process clause "prescribes nothing that is not comprehended by said section of the federal constitution" and "is manifestly in scope and purpose identical with said provision of the federal constitution." Consequently, neither judges nor attorneys concern themselves with the state provision since the higher federal sanction controls.

Respondent, we submit, misconstrues *Bowe v. Scott,* 233 U. S. 658. That case was decided on the authority of *Miller v. Cornwall Railroad Co.,* 168 U. S. 131 and *Harding v. Illinois,* 196 U. S. 78. In the *Cornwall* case the litigant's assertion in the state court was that he was not receiving a "remedy by the *due course* of law." The quoted words were in the precise language of the state constitution but not in the language of the federal. By ordinary canons of construction, the state constitution was invoked. In the *Harding* case there had been a vague assertion that a statute took "property without due process of law" without specifying the respects in which it did so, no authority was cited or argument advanced in support of the constitutional objection, and the state court's opinion showed that its decision was based on other grounds.

CONCLUSION

This case presents an important constitutional question. The attempt to avoid its consideration is hypertechnical. We respectfully submit that the petition for certiorari is entitled to be considered on its merits.

Dated: San Francisco, California, November 25, 1952.

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